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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 61

RADIO AND TELEVISION BROADCAST TECHNICIANS LOCAL UNION 1264, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO, ET AL., PETITIONERS

v.

BROADCAST SERVICE OF MOBILE, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE [1]

STATEMENT

The question presented is whether a State court has power to enjoin peaceful picketing and related activity directed against a company, where, although the business of the company itself is not sufficient to satisfy the yardsticks of the National Labor Relations Board for the assertion of its jurisdiction, it is reasonably

[1] Pursuant to the Court's request, the government filed a memorandum prior to the grant of certiorari, expressing the view that the petition should be granted and that the judgment below should be reversed. In this brief, we amplify the views set forth in our earlier memorandum.

clear that the Board would combine the company's business with that of other related companies and assert jurisdiction over the combined group.

The underlying facts may be summarized as follows:

Petitioners ("the Union") and radio station WAIP of Mobile, Alabama, had a collective bargaining agreement covering the station's two radio technicians, only one of whom was a full-time employee (R. 162–163, 171). Effective August 1, 1962, the ownership of WAIP was transferred to respondent, which renamed it WSIM (R. 91, 154). Respondent (hereafter "WSIM") did not retain all of WAIP's staff, and replaced both of the technicians with non-union men (R. 92–95, 111–114). The Union then met with the new owners and discussed the rehiring of the full-time technician and the status of its agreement with WAIP (R. 91–93, 210–221, 245–260). The meetings were unsuccessful from the Union's standpoint, and on August 10, 1962, it commenced peaceful picketing at WSIM's premises.[2] In addition, it began a campaign of personal calls and letters to WSIM's advertisers asking them to limit their dealings to stations with union contracts (R. 203, 237, 260–263, 312–315).

WSIM thereupon filed a complaint in the Circuit Court of Mobile County asking that the Union's picketing and solicitation of advertisers be enjoined as an illegal boycott under Alabama law and a violation of

[2] The picket signs read, "WSIM NON UNION LOCAL 1264 IBEW AFL-CIO" (R. 260).

the State's right-to-work law (R. 1–5, 25–30, 77). In defense the Union challenged the jurisdiction of the State court and maintained that the labor dispute was within the exclusive jurisdiction of the National Labor Relations Board. The Union asserted that WSIM was one of a group of four radio stations known as Holt Broadcasting Service, that all four stations were commonly owned and managed, that the Board would consider their combined volume of business in determining whether to assert jurisdiction, and that the total revenue of the four stations was in excess of $100,000 per year, the amount required by the applicable Board jurisdictional standard (R. 65–67, 70–76, 78–80). The trial court issued a temporary injunction, but, after full hearing, dissolved it on the ground that its jurisdiction was preempted (R. 67–70, 388).

The Supreme Court of Alabama reversed. It held that under the law of Alabama "every reasonable intendment, not contradicted by the face of the pleadings, will be made in favor of [the court's] jurisdiction," and that, since the Union did not allege that the gross business of WSIM itself equaled or exceeded $100,000 per year, insufficient facts had been alleged to negate the existence of State court jurisdiction (R. 402–410).

The evidence in the record shows that the majority stockholder of WSIM is Charles Holt of Hattiesburg, Mississippi, who is also the majority stockholder of three other radio stations located in Montgomery, Alabama, McComb, Mississippi, and Hattiesburg,

Mississippi. Holt is also the sole owner of a corporation which renders accounting and other managerial services to all four stations. Holt's wife is a stockholder in all four stations, and Bob Robinson is a minority stockholder in the Mobile, Montgomery, and Hattiesburg stations. Holt is the president of three of the radio stations, including WSIM, secretary of the fourth, and president of the service corporation. Robinson and Mrs. Holt are also officers of all five corporations. Stanley Lightsey is treasurer of the four radio stations and the service corporation, and manager of the service corporation (R. 324–326, 339, 346).

The service corporation shares office space with radio station WHSY in Hattiesburg, Mississippi, one of the chain, in a building owned by WHSY. Holt and Lightsey also have offices in that building (R. 96, 338–339). Daily reports of the amount of business done by each station and of the amount of money deposited in the bank are forwarded by each station manager to Lightsey at Hattiesburg, and a copy is sent to Robinson in Montgomery (R. 97–98, 150, 332). Lightsey handles the overall bookkeeping for all the stations; he visits each station periodically, sees that the accounts are correct and that the bills have gone out, and attempts to collect delinquent accounts (R. 96–97, 107, 304, 329). Each station has a separate bank account, checks on which are written by Lightsey, and signed by Holt alone or by Robinson and Lightsey (R. 108–109, 327). After a purchase is made by the station manager, the bill is forwarded to

Lightsey for payment (R. 328). Lightsey, through the service corporation in Hattiesburg, prepares the income tax returns and the reports to the Federal Communications Commission for each station (R. 326–327). Lightsey made the property appraisal of the Montgomery station when Holt purchased it (R. 156–157).

The station managers have day-to-day control of the hiring, firing, and remuneration of their personnel, and of normal purchases (R. 293–294, 328–329). However, Holt and Robinson hire the managers (Robinson himself is the manager of the Montgomery station) and the national advertising representative (R. 339–341, 93).[3] They visit the stations regularly and advise the managers on matters of general policy (R. 93–94, 98–101, 150, 187, 301–304).[4] Robinson is also frequently consulted by phone (R. 303–304). When, after WSIM changed owners, the Union sought to discuss the continuation of its contract and the re-employment of the dismissed technicians with WSIM's station manager, he told them they would "have to talk to Mr. Robinson or Mr. Holt," that Mr. Holt was the "top boss" (R. 93–94). Robinson and

[3] Only the Mobile and Montgomery stations have a national advertising agent (R. 145–147, 340–341).

[4] The following colloquy between the trial court and Donald Givens, manager of WSIM at the time of the injunction proceeding, is revealing (R. 302):

> The COURT. If Mr. Holt comes in and tells you to do something, do you do it?
>
> A. Yes, sir.
>
> The COURT. And, Mr. Robinson, too?
>
> A. I would do it, I guess.

Lightsey did participate in discussions with the Union on these matters (R. 210–211, 213–220).[5]

Holt requires the radio stations to announce that they are members of the Holt Broadcasting Service (R. 86, 104). The gross revenue of the four stations exceeds $100,000 per year (R. 308, 342–343).

ARGUMENT

THE STATE COURT LACKED JURISDICTION TO ENJOIN THE UNION'S PICKETING AND RELATED CONDUCT

In *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 244, 245, this Court held that, when "it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. * * * When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board * * *." In the present case, we submit (1) that, although the operations of WAIP alone were not sufficient to satisfy the Board's jurisdictional standards, the Board would have asserted jurisdiction on the basis of the combined operations of WSIM and

[5] Both the first and second station managers of WSIM, Hale and Givens, were former employees of WHHY, the Holt station in Montgomery, and Hale returned to WHHY when Givens took his place. Moreover, after WSIM was acquired by Holt, test equipment and a tape recorder were exchanged between it and WHHY (R. 94–95, 104, 170–171, 295).

the other three stations in the Holt chain; and (2) that the Union's picketing is arguably subject to the limitations of Section 8(b)(7), and its appeals to the station's advertisers arguably protected by Section 7, of the Act. Accordingly, the State courts should have dismissed the instant suit for lack of jurisdiction over the subject matter. See *Hattiesburg Building Council* v. *Broome*, 377 U.S. 126.

1. Under Section 10(a) of the Act, the Board's statutory jurisdiction extends to any unfair labor practice "affecting commerce." However, Section 14(c)(1) added in 1959, permits the Board to "decline to assert jurisdiction over any labor dispute * * * where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided*, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959." Section 14(c)(2), in turn, provides that nothing "in this Act shall be deemed to prevent or bar any agency or the courts of any State or Territory * * * from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction."

Two principles followed by the Board are applicable to this case. First, the Board will assert jurisdiction over an employer operating a radio station if his gross receipts equal or exceed $100,000 a year. *Raritan-Valley Broadcasting Co., Inc.*, 122 NLRB 90. See-

ond, in applying this standard, the Board considers several nominally separate corporations to be a single employer if all, or most, of the following indicia of identity are present: (1) common ownership; (2) common management; (3) interrelation of operations; and (4) centralized control of labor relations. *Sakrete of Northern California, Inc.*, 137 NLRB 1220, 1222, affirmed, 332 F. 2d 902 (C.A. 9), petition for certiorari filed, No. 556, this Term; Twenty-first Annual Report, National Labor Relations Board (1956), 14–15.[6]

Each of these criteria was satisfied here. Charles Holt is the majority stockholder of all four stations and sole owner of a corporation which renders accounting and management services to them; both Mrs. Holt and Bob Robinson are also common stockholders.

There is common management: Holt is president of four of the companies and secretary of the fifth, while Stanley Lightsey serves as treasurer and comptroller of all five.

The operation of the stations is under close central control. Holt and Robinson hire the station managers and regularly visit them to advise on matters of general policy. Each station sends daily reports to Lightsey, who pays their bills and prepares their in-

[6] The validity of this approach has been sustained by several courts of appeals. In addition to *Sakrete*, see *National Labor Relations Board* v. *Royal Oak Tool & Machine Co.*, 320 F. 2d 77, 80–81 (C.A. 6); *National Labor Relations Board* v. *Jones Sausage Co.*, 257 F. 2d 878, 879–880 (C.A. 4); *National Labor Relations Board* v. *A. K. Allen Co.*, 252 F. 2d 37, 38–40 (C.A. 2).

come tax and F.C.C. returns. All stations announce that they are members of the Holt Broadcasting Service, thereby representing themselves to the public "as one integrated enterprise" (*Checker Cab Co.*, 141 NLRB 583, 586–587; *Overton Markets*, 142 NLRB 615, 618–619).

Finally, there is centralized control of labor relations. For, while day-to-day employment matters are left to the station managers, Holt, Robinson and Lightsey have sole authority to negotiate with unions.

In these circumstances, it is plain that the Board would find that the connection between the various stations was sufficient to make them a single employer for jurisdictional purposes. See *The Family Laundry, Inc.*, 121 NLRB 1619; *Canton, Carp's, Inc.*, 125 NLRB 483; *V.I.P. Radio, Inc.*, 128 NLRB 113; *Perfect T.V., Inc.*, 134 NLRB 575; *Checker Cab Co.*, 141 NLRB 583; *Overton Markets*, 142 NLRB 615.[7] Common control of this kind, which is not merely potential, but actual, clearly affords a sufficient basis for a single employer finding. See *Sakrete of Northern California* v. *National Labor Relations Board*, 332 F. 2d 902 (C.A. 9), enforcing, 137 NLRB 1220, petition for certiorari filed, No. 556, this Term; *The Family Laundry, Inc.*, *supra*.[8]

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[7] As the Court observed in *National Labor Relations Board* v. *Stowe Spinning Co.*, 336 U.S. 226, 227: "Interlocking directorates and family ties make the four equal one for our purposes."

[8] The judicial decisions cited by respondent (Reply to Government's Memorandum, 9) do not hold that power to control day-to-day operations is necessary before separate corporations

Respondent contends (Brief in Opposition 18–19, and Reply to Government's Memo, 6, 13–20) that, in applying the criteria of interrelation of operations and centralized control of labor relations, the Board has required that there be uniformity in labor conditions among the various companies and an interchange of employees—factors which are absent here (but see n. 5, p. 6, *supra*). The cases cited by respondent, however,[9] reflect the application of jurisdictional yardsticks which were abandoned by the Board in 1958. At that time, in response to this Court's decision in *Guss* v. *Utah Labor Board*, 353 U.S. 1,[10] the Board promulgated new standards under which it now exercises a larger measure of its legal jurisdiction. See Twenty-third Annual Report, National Labor Relations Board (1958), 7–9. It has not only lowered the dollar-volume prerequisite, but has also discarded altogether the requirements that there be uniformity of labor conditions at the local level and an interchange of employees before two entities may

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may be considered a single employer under the Act. They merely hold that common ownership plus a potentiality for common control is not sufficient. Much more has been shown here, including actual common control.

[9] Respondent relies principally on six cases: *Central Dairy Products Co.*, 114 NLRB 1189; *Toledo Service Parking Co.*, 96 NLRB 263; *Consolidated Gas Co.*, 107 NLRB 148; *Goodman's, Inc.*, 101 NLRB 332; *Clark Concrete Corp.*, 116 NLRB 321; *Modern Linen & Laundry Service, Inc.*, 110 NLRB 1305.

[10] In *Guss*, the Court held that the states were without power to step in when the Board had declined to assert its jurisdiction. The states now have such power by virtue of Section 14(c)(2), added in 1959 (p. 7, *supra*).

be treated as a single employer for jurisdictional purposes.

Thus, in *The Family Laundry, Inc.*, 121 NLRB 1619 (1958), the Board found that several laundry and linen supply companies constituted a single employer—by virtue of common stock ownership, interlocking officers and directors, and central control and supervision over general matters—even though there was no interchange of employees and each company was operated independently with respect to local matters. In *Canton, Carp's, Inc.*, 125 NLRB 483 (1959), the Board treated several stores as a single employer, albeit there was no interchange of employees and each manager had the right to determine his employees' terms and conditions of employment and had exclusive control over their hire and discharge. The Board concluded that the lack of a common labor relations policy at the local level was outweighed by other evidence establishing a single employer relationship, *i.e.*, common ownership, centralized control of nonlabor matters, and purchasing through a common affiliated organization. And, in *Overton Markets, Inc.*, 142 NLRB 615 (1963), the Board found that seven companies operating ten grocery stores were a single enterprise, notwithstanding the lack of employee interchange and of common control over employment conditions at the local level; the Board relied, *inter alia*, on the fact that the stores were owned or controlled by members of the same family, and were represented to the public as a single entity by their use of the same trade name, joint weekly newspaper advertising, and

identical special sales. As we have demonstrated, the evidence here shows a comparable degree of integration among the four stations.

In sum, on the record here, it is reasonably certain that the Board would consider the four stations as a single employer for jurisdictional purposes, and, since the total revenue of the combined enterprise exceeds $100,000, assert jurisdiction over all the stations.

The Board has established a procedure whereby the parties to a proceeding before a State court or agency may file a petition with the Board for an advisory opinion on whether it would assert jurisdiction over the controversy involved. See 29 CFR 102.98; *Jemcon Broadcasting Co.*, 135 NLRB 362; *Hartford Bldg. Maintenance Co.*, 145 NLRB No. 140, 55 LRRM 1173; but cf. *National Bulk Carriers*, 134 NLRB 1186. At the very least, the State court should have permitted the Board to decide the question in the first instance.

Nor is a different conclusion warranted by the court's finding that, since the Union did not specifically allege that WSIM's business equaled or exceeded the Board's $100,000 yardstick, it had not overcome the Alabama rule that "every reasonable intendment not contradicted by the face of the pleadings will be made in favor of jurisdiction" of the State court (Pet. 22a–23a). This procedural rule cannot bar this Court from determining the merits of the Union's claim of preemption. For, irrespective of the precise language of its pleading, the

Union contended throughout that the Board had jurisdiction over the business involved and was permitted to introduce evidence to show that the ties among the four stations were such as to constitute them a single employer under the Board's standards. In these circumstances, it would be wholly unrealistic to conclude that the preemption defense had not been adequately raised in the State courts.

2. It is equally clear that the conduct involved is regulated by the National Labor Relations Act. At the time of the picketing the Union did not represent any of WSIM's employees, and it was alleged that the Union had sought recognition and a contract despite its lack of majority status (Brief in Opposition, 4). Plainly, therefore, the picketing here "was arguably subject to" Section 8(b)(7) of the Act, which regulates recognitional picketing. In addition, the appeals made to the station's advertisers appear to be activity which Congress either affirmatively protected or deliberately decided to leave free of restraint. See *National Labor Relations Board* v. *Servette*, 377 U.S. 46; *Local 20, Teamsters* v. *Morton*, 377 U.S. 252, 258–260.[11]

[11] The applicability of the National Labor Relations Act is not affected by the circumstance that, since one employee is now employed by WSIM in its engineering department, the Board may find that that department no longer constitutes an appropriate unit for bargaining purposes (Reply to Government's Memo. 20). Even if the Board were unable to establish a bargaining unit for the employees whom the Union sought to represent, the Act would still regulate the Union's use of picketing and related activity to secure representation

The Supreme Court of Alabama did not reach the question whether the State court could assume jurisdiction "on the basis of facts claimed to have been in violation of this state's Right to Work Law" (Pet. 23a). That aspect of the case, however, is fully disposed of by this Court's observation in *Retail Clerks, Local 1625* v. *Schermerhorn*, 375 U.S. 96, 105:

> * * * picketing in order to get an employer to execute an agreement to hire all-union labor in violation of a state union-security statute lies exclusively in the federal domain (*Local Union 439* v. *Farnsworth & Chambers Co.*, 353 U.S. 969, and *Local No. 438* v. *Curry*, 371 U.S. 542), because state power, recognized by § 14 (b), begins *only with actual negotiation and execution of the type of agreement described by § 14(b)*. Absent such an agreement, conduct arguably an unfair labor practice would be a matter for the National Labor Relation Board under *Garmon*. [Emphasis in original.]

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rights. See *National Labor Relations Board* v. *Local 542*, 331 F. 2d 99, 104–106 (C.A. 3), certiorari denied, No. 376, this Term, October 26, 1964.

CONCLUSION

For the reasons stated, the judgment of the Supreme Court of Alabama should be reversed.

Respectfully submitted.

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DECEMBER, 1964.